

REPORT

EXPERT MEETING “TARGETING MILITARY OBJECTIVES”

**Organized by
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Abbreviations

API	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
IAC	International armed conflict
IHL	International Humanitarian Law
NATO	North Atlantic Treaty Organisation
NIAC	Non-international armed conflict
UK	United Kingdom, British
US	United States, American
WWII	Second World War

Executive Summary

A meeting of military and academic legal experts was convened by the University Centre for International Humanitarian Law (CUDIHL/UCIHL) to discuss the findings of a report that had been written in the framework of a research project on the targeting of military objectives.

The discussions turned on the definition of military objectives and how to interpret and implement this definition in contemporary warfare. The meaning of the expressions “effective contribution to military action” and “war-sustaining capability” found in definitions of military objectives was discussed in depth. That Art. 52.2 of the First Additional Protocol to the Geneva Conventions constituted the standard of evaluation of a military objective was reaffirmed despite the existence of competing concepts. It became also clear that modern methods of warfare did not require a radical reinterpretation of military objectives.

Particular emphasis was laid on the minimization of civilian losses and damage to civilian property in conjunction with proportionality and precautions in attack. What has to be factored into proportionality and how the feasibility of a precautionary measure is to be evaluated were among the questions under discussion. Clearly, reverberating effects have to be factored into the proportionality evaluation of an attack today, in spite of practical problems. With regard to precautions in attack, the experts tried to clarify when additional measures of verification had to be undertaken. In this context, it was considered that the limitation of own-side casualties may never be conducted at the expense of the civilian population.

The experts discussed proposals for a better implementation of international humanitarian law through the creation of international targeting standards, a model to operationalize the principle of proportionality and enquiry procedures into civilian deaths. Despite the numerous practical and political difficulties that these proposals pose, the experts agreed that it would be beneficial to follow-up this meeting with workshops involving military experts from all regions of the world as well as high level government officials to learn more about the practical implementation of the rules on targeting by diverse military forces.

Introduction

The University Centre on Humanitarian Law was commissioned by the Swiss Federal Department of Foreign Affairs to conduct research on questions related to the targeting of military objectives. The project, under the direction of Mr. Yves Sandoz, produced a report, written by Ms. Alexandra Boivin (hereafter Project Report).¹ A one day meeting of military and academic legal experts was convened to present the findings of the Project Report and discuss the questions it raised. The present report aims at synthesizing these discussions but does not aim to reintegrate them into the findings of the initial Project Report.

The meeting was held under the Chatham House rule, which provides that “participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.”²

The first point on the meeting agenda was entitled “Selecting targets that fall within the definition of military objectives”. The report reflects the experts’ attempt to clarify how to define a military objective. In particular the relationship between the definition contained in the First Additional Protocol to the Geneva Conventions and the American notion of “war-sustaining capability” gave rise to debate. The experts then turned to examine “‘Notional’ or non-physical targets”. This issue raises the question how to implement and interpret the classical definition of a military objective in the context of today’s conflicts and “compellence operations”. The morning session ended with a discussion entitled “The principle of minimum feasible damage as a tool for refining proportionality calculations in the context of ‘effects-based targeting’”. The debate focused on the practical implementation of the principle of proportionality with a view to avoid civilian casualties. The question of how to deal with reverberating effects was at the centre of attention. The afternoon session started with the topic “Precautions before and during an attack” during which the experts tried to determine what factors determined the feasibility of precautionary measures. This included a heated debate about what role the desire to limit own-side casualties played in the context of precautionary measures. The meeting concluded with a discussion about how improve the implementation of the rules on targeting.

¹ BOIVIN, A., SANDOZ, Y., *The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare*, 2004, unpublished. A summary of the Project Report (in French) is available on our website: http://www.cudih.org/english/recherche_projet.php

² <http://www.chathamhouse.org.uk>

A. Defining Military Objectives

The definition of a military objective must form the starting point of any discussion about targeting, because only military objectives may be attacked. The commonly accepted standard of what constitutes a military objective is found in Art. 52.2 of the 1977 Protocol I Additional to the Geneva Conventions (API):

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.³

All experts participating in the meeting agreed that this definition was not controversial in itself. It has been included into other international instruments⁴ and has inspired definitions found in national legal texts.⁵ What is controversial, however, is its interpretation and application.

A.1. The Two-Pronged Test of Article 52.2 API

It is commonly understood that by virtue of Art. 52.2 API, any object has to satisfy two cumulative conditions in order to qualify as a military objective: a) the object has to make an effective contribution to the military action of the defender and b) its destruction, capture or neutralization has to offer the attacker a definite military advantage.⁶

At the outset, the experts discussed whether Art. 52.2 API really constituted a two-pronged test or whether, in practice, any object meeting the first condition would *ipso facto* satisfy the second one.

One expert envisioned a situation towards the end of the conflict while armistice negotiations were ongoing. In such circumstances, the destruction of an object which by its nature makes an effective contribution to military action may not offer a definite military advantage and may hence not be attacked. Another expert responded that such a situation raised indeed questions of necessity and proportionality, but only under *jus ad bellum*. The latter cautioned against confusing the military advantage with the political aim of the war, e.g. to end the war. Even in cases where both conditions are satisfied, it

³ Art. 52.2 API

⁴ For example, Art. 2.4 Protocol on prohibitions or restrictions on the use of mines, booby-traps and other devices (Protocol II) 1980 to the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, 1980; Art. 40 San Remo Manual on International Law applicable to armed conflicts at Sea, 1994

⁵ See, for example, national military manuals with the same or similar definition in HENCKAERTS, J-M, DOSWALD-BECK, L, *Customary International Humanitarian Law* 2005, Cambridge University Press, Vol. II, Part. 1, pp.183-184.

⁶ See for instance the ICRC Commentary to API, § 2018, <http://www.icrc.org/ihl>

would be dangerous to collapse the two-pronged test into one, because this could lead people to qualify an object as a military objective by reference to its contribution to the aim of the war. Such an argumentation would render Art. 52.2 API meaningless.

All experts agreed that while the aim of a conflict was always *political*, it may only be pursued by affecting the *military* assets of the enemy.

A.2. Determining Effective Contribution to Military Action

a) The US Notion of “War-Sustaining Capability”

Focusing on the first prong of the test, the discussion turned around the question of what exactly was meant by “effective contribution to military action” and how this expression related to a classic American definition of military objective found in the Commanders Handbook on the Law of Naval Operations:

“Only military objectives may be attacked. Military objectives are combatants and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy’s war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations, including the security of the attacking force.”⁷

The most notable difference between this American definition and Art. 52.2 API lies in the use of the term “war-fighting or war-sustaining capability” instead of “military action”.⁸ The Handbook gives a list of “proper targets” for naval attack⁹ as well as of “proper economic targets”.¹⁰ In addition to these, it states that “economic targets of the enemy that indirectly but effectively support and sustain the enemy’s war-fighting capability may also be attacked”.¹¹ A footnote explains that for instance raw cotton constituted a legal target during the American civil war, as cotton provided the money to the Confederacy to conduct military operations.¹²

⁷ NWP 1-14M, § 8.1.1

⁸ Another difference lies in the inclusion of combatants in the US definition. However, even though Art. 52.2 API does not explicitly mention combatants, the ICRC Commentary to API makes it clear that “members of the armed forces are military objectives”. ICRC Commentary to API, § 2017, <http://www.icrc.org/ihl>

⁹ The list includes the following targets: “enemy warships and military aircraft, naval and military auxiliaries, naval and military bases ashore, warship construction and repair facilities, military depots and warehouses, petroleum/oils/lubricants (POL) storage areas, docks, port facilities, harbors, bridges, airfields, military vehicles, armor, artillery, ammunition stores, troop concentrations and embarkation points, lines of communication and other objects used to conduct or support military operations”, as well as “geographic targets, such as a mountain pass, and buildings and facilities that provide administrative and personnel support for military and naval operations such as barracks, communications and command and control facilities, headquarters buildings, mess halls, and training areas”. NWP 1-14M, § 8.1.1

¹⁰ “Enemy lines of communication, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants”. NWP 1-14M, § 8.1.1

¹¹ NWP 1-14M, § 8.1.1 *in fine*

¹² NWP9 (Rev.A1) FMFM 1-10 para. 8.8.1 footnote 11

Other US military texts contain slightly different definitions of objects that may be lawfully attacked. Joint Publication 3-60, which is the joint doctrine for targeting, states “Civilian objects consist of all civilian property and activities other than those used to support or sustain the adversary’s warfighting capability.”¹³ The document does not provide an explanation of what is meant by the expression “warfighting capability”.

The Air Force Pamphlet on Targeting specifies “The key factor is whether the object contributes to the enemy’s war fighting or war sustaining capability. Consequently, an identifiable military benefit or advantage should derive from the degradation, neutralization, destruction, capture, or disruption of the object.”¹⁴ In the opinion of one expert, this definition is flawed because it effectively collapses the two-pronged test of Art. 52.2 API into one by assuming that any object that meets the first requirement *ipso facto* satisfies the second one.

The Operational Law Handbook, which is said to be the document used most often by American Judge Advocates to provide legal advice says “The connection of some objects to an enemy’s war fighting or war-sustaining effort may be direct, indirect or even discrete. A decision as to classification of an object as a military objective and allocation of resources for its attack is dependent upon its value to an enemy nation’s war fighting or war sustaining effort (including its ability to be converted to a more direct connection), and not solely to its overt or present connection or use.”¹⁵ This text includes “war-supporting, manufacturing/export/import” in the list of potential economic targets.¹⁶ Furthermore, the Military Commission Instructions issued by the US Department of Defence to facilitate the conduct of military commissions to try captured enemy combatants, also use the term “war-fighting” when defining military objectives.¹⁷

The experts discussed whether the use of the expression “war-sustaining capability” instead of “military action” reflected the official American understanding of a military objective.

One expert argued that this was not *the* American position but only *one* American position and pointed to the variance of definitions among military manuals. The expert explained that there was ongoing debate within the US government about what “war-sustaining capability” meant and that if one defined “military” as “related to armed forces”, “military action” could be interpreted very broadly so as to encompass almost the same objects as “war-sustaining capability”.

Several other experts pointed out that there was virtually only one law of war manual currently in force in the US, i.e. the Commanders Handbook on the Law of Naval Operations, which inspired all other regulations and non-legal texts. They emphasized

¹³ JP 3-60, Appendix A, § 4(a)

¹⁴ AFP 14-210, Section 1C, § 1.7.1

¹⁵ *Operational Law Handbook 2005*, Chapter 2, § IX.A.4

¹⁶ *Operational Law Handbook 2005*, Chapter 2, § IX.A.1(c)(2)

¹⁷ See for instance DEPARTMENT OF DEFENSE, *Military Commission Instruction No.2*, 30 April 2003, § 5(D)

that the US President had approved the reference to “war-sustaining” in the Military Commission Instructions, and that the variance between “war-sustaining” and “military action” may create problems for US soldiers who, acting in accordance with US law, could be charged under international criminal law for violating Art. 52.2 API.

There was continued disagreement on whether the notion of “war-sustaining capability” reflected *the* official US position or not.

b) How to interpret “Effective Contribution to Military Action” and “War-Sustaining Capability” in Today’s Conflicts?

Independently of whether the term “war-sustaining capability” reflected the official US position or not, the experts tried to gain a better understanding of how the expressions “war-sustaining capability” and “effective contribution to military action” were to be interpreted concretely. How removed from immediate military action may the contribution of an object be and still qualify as a military objective under Art. 52.2 API? Is it sufficient that its contribution is only “indirect” or “discreet”? How does this determination change if the contribution is assessed in terms of “war-sustaining capability” instead of “military action”?

All experts agreed that the determination of what constitutes a military objective had to be made against the backdrop of the principle of distinction. Targeting of the sort practised during the Second World War (WWII), when anything that contributed to the war effort could be attacked was no longer acceptable.

This being said, one expert pointed out that Art. 52.2 API may indeed be too narrow for today’s conflicts – conflicts, in which armed forces are not only employed for classical military action, but have become instruments of political campaigns like ethnic cleansing.

Another expert pointed out that technological evolution brought with it new forms of warfare, like computer network attacks and made it possible today to strike a country’s financial base and its export, banking or taxation system. In response, it was argued that Art. 49 API defined attacks as “acts of violence against the adversary...”¹⁸ and that computer network attacks did not fall within this definition. Hence, the requirements of Art. 52.2 API did not even apply to this form of warfare. Another expert replied that if one considered, on the contrary, that such techniques were attacks in the meaning of API, they fit squarely into Art. 52.2 API,¹⁹ and that the term “war-sustaining capability” better accommodated these new techniques of warfare. The expert warned thus that the use of the concept of “war-sustaining capability” in conjunction with the technological

¹⁸ Art. 49 API

¹⁹ It may be argued that computer network attacks are attacks in the meaning of API because Art. 52.2 API does not only apply to the destruction of a target but also to its neutralization, which may be more relevant for computer networks.

evolution may lead to an expansion of the types of objects considered to constitute military objectives.

c) Economic Targets and their “Effective Contribution to Military Action” or “War-Sustaining Capability”

A number of experts wondered whether the notion of “war-sustaining capabilities” justified attacks on economic objects, e.g. crude oil used to generate export earnings, that the drafters of Art. 52.2 API specifically wanted to exclude after the experience of WWII. One expert referred to the fact that the expression “war-sustaining effort” had been explicitly rejected by the San Remo Manual because the connection between export and military action would be too remote.²⁰ The expert warned that the use of the term “war-sustaining” constituted a slippery slope on which one could move easily beyond financial targets, a tendency already apparent in the context of compellence operations.²¹

On the specific question whether they considered oil facilities as lawful targets, the experts agreed that if the armed forces were directly using them, they would clearly be military objectives under Art. 52.2 API. Two experts considered that if it were possible to establish that the oil was generating the income for the war effort (such as in a country where crude oil was the only major export commodity), then the oil facilities would be considered to make an effective contribution to military action. Another expert added that in any case, such an object would be considered to be a military objective under the “war-sustaining” concept.

The experts discussed whether it was still appropriate to think of economic targets in terms of export commodities that produce the financial assets to wage war in a world of economic privatization and global financial interconnectedness. The question was raised whether the nexus between the economic activity and the financing of the military effort was close enough to consider that economic targets made an effective contribution to military action.

One expert suggested that the object’s impact on military operations should be the factor determining whether the connection was close enough. In this expert’s opinion, the American approach of “war-sustaining capability” was applying a “but-for causation” – but for having money, the enemy cannot continue the war. This has to be distinguished from situations where something merely contributes to military operations. This line of argument would lead to limit military objectives of the “war-sustaining” type to economic targets.

Another expert opposed this point of view with the argument that this would allow an attack on the taxation system, whereas such an attack would be unlawful under Art. 52.2

²⁰ San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press 1995, commentary to activities that may render enemy merchant vessels military objectives §§ 60.7-60.11, pp.149-150.

²¹ See Section B below.

API because the taxation system did not in itself make an effective contribution to military action. The latter proposed to look at what assets are used for instead of looking at how they are generated. In this sense, whenever an object merely produces assets that *may* be used for a military action, it will not be a military objective in itself. The expert acknowledged the existence of grey areas, however. While a weapons factory clearly is a military objective under Art. 52.2 API, it is less clear whether components of the textile industry and textile raw materials that may be used for the fabrication of military uniforms are military objectives or not.

With reference to Art. 56 API, one expert noted that API set a very high threshold for attacks on works and installations containing dangerous forces. By analogy, the expert suggested that only economic objects that are used in “regular, significant and direct support of military operations”²² could possibly qualify as military objectives.

d) How to determine the Intended Future Use of an Object?

With regard to objects that by their purpose make an effective contribution to military action, several experts expressed disagreement with the Project Report’s assertion that

“[...] a party would not be justified in attacking a school on the basis of field intelligence revealing that the enemy intended to use it as a munitions depot when no munitions had actually been moved in prior to the attack.”²³

Two experts criticized that the Report seemed to require absolute knowledge of the intended use on the part of the attacker. As a matter of law, however, all that is required is a “reasonable belief” as to the future use of the object. Moreover, from a military point of view, one may need to strike before the object has been put to its intended use.²⁴

The experts agreed that with regard to the subjective factor in determining purpose, which involves the *mens rea* of the adversary, the question is how remote the possibility of use must be. If we *know* that the enemy *intends* to use it, then that is certainly sufficient. With regard to the lack of intelligence on the intended use of an object, there must be a certain *reasonable probability* that the object may be used for a military purpose. All experts agreed that it was difficult to define a standard of reasonable probability but that it must certainly stop short of the mere objective *possibility* of use.²⁵

²² Art. 56.2 API

²³ Project Report, p. 15

²⁴ To wait until the munitions have been moved into the school may be unpractical in military terms and may also pose a problem in terms of precautions as it may be preferable to destroy the munitions before they have been moved into a school and its neighbourhood inhabited by civilians.

²⁵ The contrary view is expressed in the *Operational Law Handbook 2005*, Chapter 2, § IX.A.3(f): “*Purpose* means the future intended or possible use [...]”

A.3. Assessing the Definite Military Advantage

The second prong of the test contained in Art. 52.2 API was discussed only shortly. One expert noted that the determination of the definite military advantage was purely situational. With regard to the term *definite*, the ICRC Commentary to API excludes attacks that “only offer potential or indeterminate advantages”²⁶. In its 2005 army training handbook, the US recognizes that “*this raises interesting questions regarding enemy morale, deception operations, and strategic views of advantage versus tactical advantages of individual attacks*”.²⁷ The British Manual of the Law of Armed Conflict, inspired by the Commentary to API, uses the terms “concrete” and “perceptible”.²⁸ This means that the commander has to be able to articulate how the attack affects military operations that he or she controls.

With regard to the scope of the military advantage, it is worth noting that the UK government issued a statement on ratification of API to the effect that the advantage anticipated is that from the attack as a whole and not only from isolated parts thereof.²⁹

A.4. Target Lists are not an Option

The discussion about the intended future use of an object also raised the question whether lists of pre-defined targets were practical. All experts agreed that predefined lists of targets, typically including all means of communication and transport, were not desirable for several reasons.

One expert considered that lists were too simplistic as the listing of means of communication would in fact permit to attack any household with a computer or any mobile phone facility. This expert considered the possibility of defining what means of transportation and communication were used solely by the military, but thought that lists were not flexible and specific enough to adapt to changes over time and to technological evolution.

Another expert pointed out that in practice, the only object that always qualified as a military objective was military equipment. For all other targets, there would be a planning process and an evaluation in terms of the danger the attack poses to one’s own forces, what the target is used for, etc.

All experts agreed that lists could lead to the undesirable impression that everything on the list must be a military objective at all times, or conversely, that if an object was not on the list, it must be protected.

²⁶ ICRC Commentary to API, § 2024, <http://www.icrc.org/ihl>

²⁷ The Judge Advocate General’s School, *Law of War Handbook*, 2005, at p. 169.

²⁸ BRITISH MINISTRY OF DEFENCE, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, § 5.4.4.i. p. 56

²⁹ *Ibid.* § 5.20.5 p. 67

B. Targeting in Compellence Operations

B.1. The Rationale of Compellence Operations

Compellence operations are motivated by the belief that it is more efficient to hit the leadership of a State by destroying its palaces or other psychologically, ideologically or symbolically important objects, instead of attacking military objectives in the classical sense. In contrast to traditional land-claiming or occupation campaigns, such operations aim at changing the regime in place and its behaviour. Hence, they are particularly concerned with notional, non-physical targets the destruction of which is believed to affect the morale of the civilian population, undermine the legitimacy of the leadership and weaken the enemy's will to wage war.

In support of this concept, one expert noted that if an attacker wanted to change the enemy leader's policy, it would not be of much use to strike the military as they do not affect the decision making process. Instead, it may be more successful to target objects that are dear to the leader. It was also mentioned that by striking the regime itself in form of its palaces, etc. the attacker could make war too costly for the enemy regime and coerce it into adopting a different course of action. The argument was made that compellence operations would be more humanitarian because the conflict would end sooner.

Based on historical experience, numerous experts voiced doubts about whether this strategy was really more efficient. Compellence operations were criticized for their presumption that political leaders act rationally. The concept was said to rely too much on speculations about the relative value of a symbolic object to the leadership.

B.2. Why Targeting in Compellence Operations may (not) be Different

Several experts observed that the concept of "war-sustaining capability", in particular in conjunction with compellence operations, could incite the targeting of notional, non-physical targets that were believed to be most valued by the enemy and that may not be military targets in the traditional sense. A discussion took place on whether notional targets fell within the traditional interpretation of Art.52 API, whether there was still a link between the object of attack and the military action in a narrow or wide sense, or whether a new practice was developing.

a) Stopping Propaganda: Targeting the Mass Media to affect Civilian Morale

A major part of the discussion turned around the question whether an attacker who wanted to influence the population's support of the leadership could legally attack the mass media.

Assuming that computer network attacks were not attacks in the meaning of API, one expert argued that it would be preferable from a *jus ad bellum* perspective to stop the mass media from broadcasting with non-violent means than to bomb. The same expert opined that if the attacker decided to stop the broadcasting with violent means, (e.g. the NATO attack on studios of Radio Televisija Srbije (RTS) of 23 April 1999), and if communication centres would henceforth be considered to be more important military objectives than bridges, this would change IHL because these targets did not constitute traditional military objectives. The expert warned that in such a case, *The Washington Post* would become a legitimate target in case of an IAC involving the US.

One expert suggested that it was better to have recourse to computer network attacks against the mass media than to use military force in cases of Security Council enforcement actions. Another expert responded that self-defence was as lawful under international law as a Security Council enforcement action, and hence, the same argument would apply to any State acting in self-defence. The expert reiterated that as *jus in bello* applied as soon as there was an armed conflict, in a certain sense every war was a compellence operation. Other experts shared this view and questioned whether the creation of a new regime of compellence operations distinct from the traditional concept of military objects and characterized by non-violent methods would be practical at all. They feared that once non-violent means had not yielded the expected results, the attacker would fall back into traditional bombing of the mass media.

Trying to clarify what was actually meant by stopping propaganda one expert argued that if it meant stopping civilians from knowing about the war and supporting it enthusiastically, then this would be equivalent to targeting civilian morale. If, on the contrary, it meant stopping civilian support for the government's campaign of ethnic cleansing, then there would be a closer nexus to a prohibited activity. Two experts responded to this that the legality of the government's instructions was irrelevant under IHL. A broadcasting station, such as *Radio Mille Collines* would constitute a traditional military objective, because it broadcasted instructions about the conduct of military operations, whether illegal or not.

There was general agreement that radio stations, newspaper agencies, and the like would not constitute military objectives if they had no clear nexus to military operations and were hence only attacked to affect civilian morale.³⁰ Two experts clarified that it is still lawful to target a military objective that meets the standard of Art. 52.2 API with the aim of affecting civilian morale.

Another expert agreed in that *de lege lata*, notional or non-physical targets may constitute an aim but that only physical targets may be attacked. The expert conceded that contemporary conflicts created certain problems that had not occurred to the drafters of API. Nevertheless, the expert pointed out that to date, no new criteria that guaranteed a

³⁰ One expert cautioned that if one accepted the concept of compellence operations and notional targets, in a conflict involving an Islamic country, all mosques, where the encouragement for the fighting takes place would become military targets.

minimum of humanity and were objectively assessable had been proposed. The criterion of “connection to military action” and Art. 52.2 API remain the determining standards of evaluation.

It was also pointed out in this context that no attack in recent conflicts had been justified on another than the classic understanding of military objective. The attack on the RTS facility, for instance, was justified on the basis that it was part of the command and control network of the Serbian armed forces. The decapitation targets in Iraq were virtually always justified in connection with military operations (storage facility, organization point, control). The expert agreed that there should be great concern that compellence operations had the potential for stretching the classic understandings of IHL but that this was not yet occurring in practice.

b) Ending Ethnic Cleansing: Targeting the Revenue Office in Defence of Others

One expert observed that during the NATO campaign in Kosovo the politically stated objective of the war was to stop the ethnic cleansing and put an end to the appalling humanitarian situation. In such a case, would State institutions that enable the enemy government to determine to which ethnic group a person belongs constitute military objectives? The expert doubted whether these institutions really made an effective contribution to the military action of the enemy as envisaged under Art. 52.2 API and whether their destruction could really be regarded as conferring a definite military advantage.

One expert considered that if the revenue office held the source of information that allowed the government to identify people to persecute, then this would constitute a lawful military objective under Art. 52.2 API. Several other experts disagreed and argued that no justification for this could be found in IHL and that an attack on the revenue office would be at variance with the principle enshrined in the St. Petersburg Declaration, i.e. “that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”?³¹

Two experts suggested that an attack on the revenue authorities could be justified with a defence of others argument. They reasoned that such an argumentation had been brought before the UK Parliament to justify the intervention in Kosovo and mentioned that all military manuals authorize soldiers to intervene in defence of civilians who are attacked by other civilians. As an example, another expert mentioned the Alliance strikes against German infrastructure during WWII in order to stop the concentration camps from functioning.

Another expert cautioned that such an argumentation had no basis in IHL. The expert feared that it would effectively expand the list of military objectives by virtue of the

³¹ 1868 St.Petersburg Declaration

purpose of the conflict. Another expert agreed in that concentration camps and their supporting infrastructure did not constitute military objectives as they were not part of military operations. Similarly, it was submitted that revenue offices did not constitute military objectives in Kosovo as their destruction did not confer a military advantage to NATO. In response to this, one expert argued that the difference was that NATO's military advantage stemmed from the military advantage created for the Kosovo Albanians on whose side NATO was fighting, whereas the Allies in WWII were not involved in an IAC on the side of the victims of concentration camps. This line of argument did not convince all experts and some of them were under the impression that this would in effect result in an amendment of Art. 52.2 API in the name of defence of others.

While most experts agreed that IHL did not exclude the application of other principles of law, they were critical of invoking defence of others as a justification. There was agreement that in the case of genocide committed by combatants in an IAC, these combatants may be attacked. The question of whom and what may be attacked in case of a genocide committed by civilians (e.g. members of the ministry of the interior and unaffiliated supporters) in an IAC remained unsettled. Some experts considered that these civilians were taking a direct part in hostilities, as the genocide was a State-based exercise, and may hence be attacked. Another group of experts defended the point of view that these civilians did not belong to a party to the IAC, but may still be attacked on the basis of defence of others, because the attack would contribute to stopping the genocide.

B.3. IHL and Strategic Choices

In the opinion of one expert, the discussion about what may be targeted in a compulsion operation is linked to the fact that in recent conflicts, attackers heavily relying on airpower risked running out of targets to bomb. The expert adduced the example of Afghanistan, where after all the command and control centres had been destroyed by the air force, the Taliban still remained in control of the country. In this expert's view, the attacker is then left with the choice between giving up the campaign as there are no more military objectives to target from the air, or to occupy the territory. Occupation may not be an attractive option but instead of extending the list of military objectives in function of the non-military aim of the war (such as to remove the Taliban regime from power), it may be the only choice in conformity with IHL.

The example raises the more general question of how military planning, motivated by the desire to avoid territorial occupation, affects the implementation of IHL. A number of experts considered that to move in with land forces at an early stage of a campaign would minimize the destruction as objects as they may not have to be bombed from the air but could be occupied and controlled on the ground instead. Another group of experts strongly opposed this. For them, all that matters is whether the target is in fact a military objective or not. The way a campaign is led is outside of the realm of IHL. The idea that IHL could drive strategic choices was outrageous, as even Art. 57 only referred to tactics and not to strategy.

C. Limiting Collateral Damage

C.1. Is there a “Principle of Minimum Feasible Damage”?

According to the Project Report, one of the principles regulating the conduct of hostilities is the “principle of minimum feasible damage”. The experts discussed what the exact content of such a principle would be, whether this principle was to be subsumed under precautionary measures in attack or whether it was a separate and distinct principle. The issue was when this principle would be implemented in the decision-making procedures on targeting.

One expert believed that the principle of “minimum feasible damage” existed as a principle distinct from other principles regulating the conduct of hostilities. The expert drew an analogy from the fact that under IHL the parties to the conflict do not have a right to kill enemy soldiers, but merely to put them *hors de combat*, and argued that the idea of minimization of damage was at the origin of the principle of superfluous injury and unnecessary suffering and the prohibition of the use of poison. Most experts were of the view, however, that the principle should be understood as referring to civilian losses only. The proposed “principle of minimum feasible damage” was somewhat confusing in that it seemed to create an obligation to minimize damage in general. It should not be understood in relation to the question of economy of force. All that is required by API is that all *feasible* measures be taken to minimize damage to *civilian* objects and *civilian* losses. They noted that the ICRC’s customary law study³² presented the “principle of minimum feasible damage” as a sub-principle of the principle of precaution that required the attacker to choose means and methods of attack that minimize civilian damage.

One expert considered that even if collateral civilian damage was not expected to be disproportionate, the principle of “minimum feasible damage” could require the commander to consider whether even less collateral damage would be possible and, if affirmative, choose that option. This could put an additional burden on attackers who have more sophisticated means at their disposal. For experts who look at the “principle of minimum feasible damage” from this angle, the obligation it entails is no different from the requirement of Art. 57.2(a)(ii) API.³³ Consequently, the principle may be subsumed under the heading of precautions in attack and the question arises what precautionary measures are *feasible* and how to assess the *availability* of alternative means.

³² HENCKAERTS, J.-M., DOSWALD-BECK, L., *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005, Vol.1 Rule 15, p 51.

³³ Art. 57.2 (a) (ii) API: With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: [...] (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects.

Other experts, on the other hand, were of the view that the requirement to minimize civilian damage is part of the evaluation of proportionality in that an attack may only be expected to be proportionate because a means or a method has been chosen that causes less collateral damage than another one.³⁴

One expert combined both approaches, stating that the requirement to minimize civilian damage is on the one hand a requirement to choose means and methods of attack causing minimal damage which will depend on feasibility and availability of alternative options, and, on the other hand, an absolute requirement included in the principle of proportionality.

C.2. The Minimization of Civilian Damage and the Principle of Proportionality

a) Implementing Proportionality

The experts discussed how the minimization of damage was implemented in practice. Specialists explained that the evaluation of proportionality was made first and foremost in the light of the value of the target and the technical means necessary to neutralize or destroy it.³⁵ Unless civilian losses are expected to be clearly excessive, no further steps are taken at the tactical level to minimize civilian damage. As a second step, the minimization of civilian damage is then taken into account in the form of feasible precautionary measures at the operational level.³⁶ In these experts' opinion, military commanders may be inclined to minimize damage further even if the attack was expected to be proportionate. It transpired from the discussions, however, that they would do so not because they felt obliged by a "principle of minimum feasible damage", but because of considerations of humanity. There was some disagreement among the experts as to what extent considerations of humanity play a role in the minimization of damage at the tactical level compared to considerations of taking out the target with speed and advantage. It was pointed out that in recent conflicts attacks had rarely been criticized on the basis of proportionality. Criticism more often concerned alleged violations of the principle of precautions in attack.

b) Proportionality and Reverberating Effects

Another interesting issue that arises in connection with the minimization of civilian damage and the assessment of proportionality in attack is the time span and the geographical space over which proportionality is assessed. Recent conflicts have

³⁴ Art. 51.5(b) API: Among others, the following types of attacks are to be considered as indiscriminate: [...] (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

³⁵ The destruction of a hard target requires a penetration weapon for instance.

³⁶ After the tactical decision to take a city, the question whether to use artillery or tanks with a view to minimize civilian damage forms part of the battle plan.

demonstrated that attacks on electrical grids, power plants or water pumping stations (assuming they are military objectives) can have considerable reverberating effects on the health of the civilian population. To what extent do reverberating effects have to be factored into the proportionality analysis, and how far removed may the effects be from the initial attack on the military object?

In response to the question whether the military take reverberating factors into account when assessing proportionality, one specialist answered that in the planning of an attack disease, access to clean water and climatic conditions, as well as the effects of a siege would enter the equation. Consequently, to take a city with speed and massive force may cost less civilian lives than to move in slowly and subject the civilian population to risks over a longer time period. Another expert considered that even though these considerations were appropriate, they were not imposed by IHL. In this expert's view, the change in targeting behaviour between the Second Gulf War (1990-1991) and the Third Gulf War (2003)³⁷ with regard to electrical grids was not due to a sense of legal obligation but rather to political opportunity and considerations of economy of force. It was mentioned that US military publications contradicted each other, but that one of them specifically refers to reverberating effects.³⁸

To take reverberating effects into account when assessing the proportionality of an attack poses problems of causality which are extremely difficult to come to terms with, as evidenced by the negotiations leading to the Protocol on Explosive Remnants of War to the Conventional Weapons Convention.³⁹ One expert suggested using the term *reasonable* causality. The destruction of a water pumping station, for instance, would make an increase in civilian deaths not only possible but *likely*, in which case the connection would be quite close. Other experts agreed that a *close* nexus would be required for effects to be factored into the proportionality analysis. Most experts seemed to agree that the proportionality analysis did not only take into account civilian deaths and injuries as an immediate consequence of the attack, but also civilians dying of thirst, if there was a *reasonable expectation of causality*, or if thirst and certain diseases were a *likely* or *foreseeable* consequence of the attack. Several specialists voiced concern about how to ascertain what effects should reasonably be expected in practice. A war-fighter does not normally have the necessary training to assess the public health risks of an attack. This problem rejoins the question of what feasible precautionary measures will have to be taken if reverberating effects are foreseeable. Does there have to be a medical officer or a public health officer in the mission planning cell?

³⁷ The First Gulf War involved Iran and Iraq from 1980 to 1988

³⁸ "Collateral and Additional Nature of Effects. Effects often spill over to create unintended consequences, usually in the form of injury or damage to persons or objects unrelated to the objectives. Sound planning should allow for consideration of the risks of unintended second- and third-order consequences". US Joint Chiefs of Staff, Joint Doctrine for Targeting, Joint Publication 3-60, 17 January 2002, at I-7.

³⁹ 2003 Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects)

C.3. The Minimization of Civilian Damage and the Obligation to take all Feasible Precautions

Most experts agreed that for all practical purposes, the “principle of minimum feasible damage” is best understood as expressed in Art. 57 API, which comes into play only if the target is a military objective and can be attacked proportionately. By virtue of Art. 57.2(a)(ii) and 57.3 the attacker is under an obligation to assess alternatives that minimize incidental civilian losses and collateral damage to civilian property. It was emphasized that 57.2(a)(ii) and 57.3 API implied that these alternative means or methods yield the same or a similar military advantage to the attacker.

a) Assessing the Availability of Alternative Means and Methods

The availability of alternative means and methods depends on the context and has to be made in the light of the conflict as a whole. For instance, an attacker who has precision-guided munitions available is not necessarily under an obligation to use them in a particular attack, even if they would cause less damage than another weapon. The attacker may prefer to withhold these munitions for a later stage of the conflict, which is expected to involve urban warfare. This raises the question of what factors should be taken into account when assessing the availability of alternative means and methods.

Several experts agreed that the seven factors indicated in the British Manual of the Law of Armed Conflict seemed very appropriate:

“...Importance of the target and the urgency of the situation; the intelligence about the proposed target; what it is being or will be used for; the characteristics of the target itself, for instance if it houses dangerous forces, etc; the weapons available, range, accuracy, and radius of attack; the conditions affecting the accuracy of targeting, such as terrain, weather, night or day; the factors affecting incidental losses or damage, such as the proximity of civilians, civilian objects in the vicinity of the target or other protected objects...; risk to own troops under the various options open to the commander.”⁴⁰

It was emphasized that the assessment of alternative means and methods was an ongoing process throughout operations. The assessment included not only the availability of certain technologies but also the behaviour of the enemy.⁴¹

One expert criticized the fact that the Project Report mentioned considerations of cost as a factor to be taken into account in the analysis of alternatives. In this expert’s opinion, whether a certain weapon is cheaper should not enter the assessment of available means.

⁴⁰ UK MINISTRY OF DEFENCE (ed.), *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, § 5.32.5 p. 83

⁴¹ How the defender’s behaviour influences precautionary measures will be discussed in Section C d) below.

b) What Measures of Verification are Feasible?

The bombing of the Chinese embassy in Belgrade by NATO on 7 May 1999 illustrates the importance of adequate verification, something that has to be taken into consideration in the planning stage of an attack. Art. 57.2(a)(i) API calls upon the attacker to do everything “feasible” to verify that the target is indeed a military objective. What measures of verification have concretely to be taken to fulfil this obligation?

The experts agreed that there was no obligation to use a certain kind of high technology for verification but that an attacker who did not have the technology was barred from certain attacks if there persisted a doubt about whether the target was in fact a military objective.

In the context of high altitude bombing, and with particular reference to the NATO air campaign in Kosovo, some experts suggested that Art. 57.2(a)(ii) API imposed an obligation on the attacker to require eyes-on verification of the target by the pilots before engaging it. Other experts explained that in practice pilots almost never get close enough to the target to reliably verify its nature with their own eyes. These experts considered that in the context of air bombardment, target identification and verification by technological means was more reliable. It is thus of primordial importance that all feasible measures of identification and verification are taken to ensure that intelligence about the target is correct and up to date. The experts did not explain in detail how far an attacker had to go in military intelligence gathering to render an attack lawful from the point of view of feasible verification. Clearly, there is no obligation to acquire technology. As soon as high technological means of verification are available, though, the feasibility of their utilization has to be evaluated.

From the point of view of military organization, several specialists stated that the question of precautionary measures had to be dealt with at every level of military hierarchy. One expert believed that higher levels had more sophisticated means at their disposal and that more measures were feasible. Accordingly, higher levels have to cooperate with lower levels to provide them with the means to take all feasible precautionary measures. Another expert responded that sometimes it was rather the people on the ground that had the means to carry out the appropriate precautionary measures.

c) Limiting Own- Side Casualties and “The Rule of Doubt”

The experts agreed that the limitation of own side casualties was sensible military practice and not objectionable in itself. They also agreed that the protection of one’s own forces must never be conducted at the cost of the civilian population. But how does the desire to protect one’s own forces influence the feasibility analysis of precautionary measures?

With reference to the accidental attack by a US fighter jet on a refugee convoy near Prizren on 14 April 1999, one expert suggested that the US could have correctly identified the target as a civilian object if they – like other forces – had flown at a lower altitude. One specialist responded that it was sensible air force practice to fly outside the threat envelope of surface-to-air missiles, and that IHL did not impose an obligation to the contrary. The expert considered that the attacker would only be under an obligation to take more precautionary measures if there was an indication that the target needed to be visually identified.

The argument was made that an attacker who does not have ground identification will have a stronger doubt about the identity of the target than an attacker who posts soldiers on the ground or flies lower, thereby accepting a greater risk to own forces. As all attackers are subject to the same rules on precautions in attack this “rule of doubt” may require the attacker to fly lower or to use ground verification to render the attack legal. Another expert replied that the attacker who stays at a high altitude and does not use ground verification is less likely to have an indication that raises doubt about the target in the first place. In order to solve this problem of logic, another expert suggested that additional verifications had to be made in situations which were objectively more likely to change over time.

It was pointed out that the ICRC’s customary law study did not find the “rule of doubt” to be a rule of customary international law.⁴² Insofar as the rule was applied in practice, the experts agreed that if there was a doubt about whether the target was (still) a military objective or whether the attack may still be expected to be proportionate, the attacker had to take additional precautionary measures, even if this involved a higher risk for own troops. What would be the minimum threshold of certainty below which additional precautionary measures had to be taken, remains yet to be determined.⁴³

In this context, the experts discussed the following quote by Rogers:

“[I]f the target is assessed as not being worth [a greater degree of] risk and a minimum operations altitude is set for their protection, the aircrew involved in the operation will have to make their own assessment of the risks involved in verifying and attacking the assigned target. If their assessment is that (a) the risk to them of getting close enough to the target to identify it properly is too high, (b) that there is a real danger of incidental death, injury or damage to civilians or civilian objects because of lack of verification of the target, and (c) they or friendly forces are not in immediate danger if the attack is not carried out, there is no need for them to put themselves at risk to verify the target. Quite simply, the attack should not be carried out.”⁴⁴

The experts expressed reservations about the phrase “identify [the target] properly” (a). One expert suggested replacing this with “adequate verification of the target” as the

⁴² HENCKAERTS, J.-M., DOSWALD-BECK, *Customary International Humanitarian Law*, Cambridge University Press, 2005, Vol.1, Commentary to Rule 10, at pp.35-36.

⁴³ For an attempt to illustrate the relationship between additional precautionary measures and own-side casualties in a graphical manner, see Annex II to this report.

⁴⁴ ROGERS, A.P.V., “Zero-Casualty Warfare”, *International Review of the Red Cross*, Vol. 82, No. 837, 2000, p.179

target may not be attacked in any case if it was not identified properly. One expert felt that the language used was too absolute, as almost every attack involved “a real danger” of civilian death, injury or damage (b). The quote was also criticized for its requirement of an “immediate danger” to own or friendly forces (c), which seemed to tigt a standard. Instead, a term such as “predictable” danger would be more appropriate.

Apart from this criticism, the experts felt that the more interesting question was what would happen if (a) and (b) were fulfilled (i.e. additional precautionary measures involve too high a risk for the pilots and there is a real danger of civilian losses) but that at the same time the target did pose an immediate danger for friendly forces (c). After some discussion, the majority of experts seemed to agree that the feasibility of additional precautionary measures had indeed to be evaluated in the light of the additional risk these measures created for the pilots (a). However, the lives of the pilots who conduct the attack may not be factored into the proportionality evaluation of the attack. What determines proportionality is the balance between the expected incidental civilian losses (b) and the own or friendly forces that are expected to be saved by the attack (c).⁴⁵

d) The Defender’s Behaviour and the Feasibility of Precautionary Measures

Some experts regretted that the Project Report had not treated the obligations of the defender with regard to precautionary measures. Most experts accepted the idea that in practice, the defender’s behaviour affects the attacker but they emphasized that the attacker may not be absolved of any responsibility on the basis of the defender’s actions. The ICRC’s customary law study found that the obligations of the defender were rather vague and that in most urban areas, there was a problem of collocation. One expert suggested the defender’s behaviour should be thought of like weather conditions, which may be favourable or not. If the defender intermingles civilian with military objects, how does this reality affect the attacker’s precautionary measures and the feasibility evaluation?

Several experts made reference to the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property which criminalizes serious violations of the convention.⁴⁶ It was pointed out, however, that while it was unlawful to use cultural property for military purposes, this was not the case for civilian objects.

The experts agreed that problems of collocation and intermingling had to be taken into account when deciding on precautionary measures. One expert explained that this would

⁴⁵ As one expert put it, to factor the pilots’ lives into the proportionality evaluation would mean that if there was a military objective of very little importance, quite a number of civilians who are expected to be killed in an attack carried out with a method that ensures the crew is not exposed to any risk (while choosing to employ another method would put them at risk), then, this attack would appear proportionate. This argument cannot be convincing as you could simply safe the lives of your pilots by refraining from the attack in the first place.

⁴⁶ Cf. Art. 15, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999

render the battlefield more complicated and that hence more assets had to be assigned to observation and verification.

There was general agreement that the presence of the civilian population had to be taken duly into account, but no more specific suggestions were made. Any suggestion that the attacker does not have to take special care if the defender mingled in the civilian population, because this would give the defender an advantage, was strongly opposed.

The discussion then turned to voluntary “human shields”, i.e. civilians who chose to be on, in, or around military objectives to render them immune from attack. There was much debate about whether these civilians were taking a direct part in hostilities, and may therefore be attacked or not.

A minority of experts considered that voluntary human shields were taking a direct part in hostilities because their actions are more effective from a military point of view than defending the objective with a weapon. They were not comparable to weapons factory workers because human shields make a more direct contribution to military action than weapons factory workers. As a consequence they did not have to be factored into the proportionality evaluation and did not affect the precautionary measures to be taken.

The majority view was that voluntary human shields, like weapons factory workers, were not taking a direct part in hostilities because they do not direct violence against the enemy. The opposite view would make them legitimate targets on the way from and to military objectives, which would be inadmissible. Article 51.7 API would not make any sense if civilians present in or on a military objective were all considered to take a direct part in hostilities, as this would not render the object “immune” from attack. Therefore such voluntary human shields had to be factored into the proportionality evaluation like other civilians

D. Implementation Procedures for more Respect

It was agreed that respect for IHL could be greatly improved by the creation of implementation procedures that could be nationally and internationally verified. Such procedures would provide commanders and soldiers with factors indicating how to conduct an attack in compliance with IHL.

D.1. Calculating Proportionality

With regard to the evaluation of proportionality, a central but very general principle, one expert suggested the creation of proportionality indicators. To render the principle of proportionality operational, what factors should enter the equation and what weight each factor should be given should be clarified. In this expert's opinion, the proportionality rule is useless without an evaluation of the price of human life. The expert proposed that each army should determine the factors that it uses to evaluate the two sides of proportionality and to exchange these findings internationally. The probability of a certain number of civilians being killed or injured and the probability of destroying the military objective should also be quantified.

According to one specialist computer programs that assess collateral damage and incidental injury already exist. Another expert suggested agreeing internationally that once a specific threshold is reached, a higher level of approval would be needed for the mission. In response it was noted that this was hardly realistic as the commander on the ground had to take an instantaneous decision that could affect the lives of hundreds of people. Moreover, several experts agreed that in most countries these strategic decisions were not taken by the military but directly by the government. As a consequence of democratic control over the armed forces the government has direct control over most targeting decisions.

While the experts agreed that with a higher level of expected casualties, higher levels of decision making have to be involved, it was pointed out that rules of engagement established a certain measure of control; for instance, specific competence was needed to engage artillery.

Apart from agreeing on levels of decision making, the discussion did not produce a clearer understanding of what factors are to be taken into account in the evaluation of proportionality. Several experts considered that this would be a political decision for the government to make and would vary among countries. One expert was very critical of setting international standards for the evaluation of proportionality and argued that the best regulatory means was human conscience. Several experts did not think it realistic or even desirable to determine specifically the loss of how many human lives would be proportionate in a certain case. These experts consider the rule of proportionality a useful one because of its important inhibiting effect on commanders launching an attack. One expert persisted in thinking that more concreteness could be brought into the principle of

proportionality by comparing how different military made their assessments of military advantage compared with civilian losses.

D.2. Setting International Targeting Standards

In order to come to a common understanding of what precautionary measures would be appropriate in a given situation, it was suggested that there should be agreement on best practices and criteria. Records of attacks should be kept and made available to others after some time. One expert considered that such records could also be valuable in war crimes trials. The majority of experts were not averse to studying so called target evaluation sheets, that are for instance used by the US army with a view to clarifying and possibly agreeing on common standards for targeting. Such sheets could be exchanged periodically among the military. The hope was expressed that a common understanding of targeting procedures would enhance the credibility of IHL and of those criticized for targeting decisions.

A majority of experts considered that the sharing of records would be unrealistic for several reasons. As strategic decisions are mostly taken by the government today, records for these decisions would be very hard to come by. This would be easier at an intermediary level of command, but again very difficult at the lowest level. Certain countries tried to keep records of every fire situation during an occupation to counter compensation problems, which has proved extremely challenging. One expert feared that armed forces with fewer resources would have practical problems in implementing such procedures fully. Incomplete targeting sheets or missing records would then be interpreted to the disadvantage of these armed forces. Several experts shared the concern about creating negative presumptions and the fact that such standards could have adverse evidentiary effects. One expert was concerned that certain States would impose one particular method on other States.

A number of experts proposed that international targeting standards should only be recommendatory. They considered that this would still promote a useful process but that different States did not necessarily need to agree on how to evaluate proportionality or the appropriateness of precautionary measures in detail. Others considered, on the contrary, that if this process was to have any real impact on the implementation of proportionality and precautionary measures there should be an obligation similar to the obligation to evaluate the legality of new means or methods of warfare.⁴⁷ Such an obligation of conduct would still leave States free to include different factors into the evaluation, which they could exchange with other States. All that was need was a mandatory process and a minimum of transparency.

Some experts were favourable to developing common training systems. Others criticized the fact that training was not sufficiently oriented towards how the rules were

⁴⁷ Cf. Art. 36 API

operationalized. These experts preferred coming up with check lists used in actual procedures that could serve as concrete aids for commanders and staff.

D.3. Towards more Transparency and Accountability

It was felt that serious enquiries into mistakes affecting civilians would contribute to the credibility of IHL and help to counter preconceived ideas that certain countries did not take IHL seriously. How the public and the enemy perceive the respect of IHL could be favourably influenced if the results of such enquiries were made public and discussed internationally.

The experts tried to determine in which cases an enquiry should be made. As a comparison, one expert pointed out that under human rights law, with regard to the right to life, a State had to make an enquiry in case of death occurring in suspicious circumstances.⁴⁸ Under IHL, should there be an enquiry in every case of civilian death, when there are more civilian casualties than expected, or when there is a non-abusive allegation that IHL was violated?

One expert pointed out the practical difficulties to which the authorities wanting to conduct an enquiry in a war zone are confronted. The security of those carrying out the enquiry has to be guaranteed, there may be cultural difficulties in dealing with the remains, the scene of enquiry may not be under the control of the party, or fighting may have destroyed the evidence. On the other hand, the International Criminal Tribunals had conducted enquiries into similar circumstances, and friendly forces incidents were also subject to enquiry even though they faced the same challenges.

The experts agreed that an enquiry did not necessarily have to be seen in a criminal context. They were, as a matter of principle, favourable to enquiries, but did not agree on situations in which an enquiry should be made.

⁴⁸ Examples of human rights treaty-body practice to this effect are: European Court of Human Rights, *Kaya v. Turkey*, February 1998 § 91, *Isayeva v. Russia* July 2005 §§ 209-14; Inter-American Court of Human Rights, *Velaquez Rodriguez v. Honduras*, July 1988 § 181, *Myrna Mack v. Guatemala*, Nov. 2003 §§ 152-8; United Nations Human Rights Committee, General Comment No. 6 § 4, *Boboeram v. Surinam*, Communication 154/1983, April 1985 § 16; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Chad*, Communication 74/92, October 1995, § 22.

E. Conclusion and Follow-up : Reaffirmation of the Rules – Uncertainty about their Interpretation and Implementation

E.1 Summary of conclusions

The discussions conducted during this expert meeting confirmed the continued validity of the rules relative to the conduct of hostilities, as reflected in API. What is subject to discussion is the interpretation and application *in concreto* of these rules in the light of new concepts and methods of warfare. The difficulty is in the detail.

It is clear that Art. 52.2 API still constitutes *the* standard definition of a military objective. Despite assertions to the contrary, the rule that every object had to meet the two-pronged test of Art. 52.2 API was reaffirmed. The interpretation of the first prong of the test, namely that the object has to “make an effective contribution to military action”,⁴⁹ is complicated by the US notion of “war-sustaining capability”, whether or not this expression reflects the official US position. How exactly these two concepts relate to each other is not entirely clear. It seems that the category of objects with a “war-sustaining capability” is broader than and includes objects making an “effective contribution to military action”. Attacks on computer networks (if they are attacks in the meaning of API at all) are easier to justify under the notion of “war-sustaining capability”. Objects of economic significance may be said to have a “war-sustaining capability” whereas their effective contribution to military action may be more difficult to establish. In order to uphold the principle of distinction, suggestions were made to clearly delimit the category of lawful economic objects of attack by qualifying the connection between the object and military operations. One suggestion required a but-for causation. Another one demanded an almost immediate link between the economic object and the military activity. A third suggestion went so far as to call for a condition of “regular, significant and direct support” by the economic object.

There was not much debate about the second prong of Art. 52.2 API and it may therefore be assumed that its interpretation does not pose major difficulties. As target lists were rejected as neither practical nor desirable, more discussion is needed to come to terms with the interpretation of the only (more or less) generally accepted definition of military objective existing to date.

Compellence operations, whether conducted by a State or by the Security Council in the form of enforcement action, do not constitute a case apart. Despite their apparent focus on non-physical targets, Art. 52.2 API remains the standard of evaluation of what objects may legally be attacked. Attacks may be conducted against mass media with the aim of stopping propaganda only if they are military objectives as defined by Art. 52.2 API. For mass media facilities to qualify as military objectives, they have to make a direct contribution to military action. This is the case if they disseminate instructions for

⁴⁹ Art. 52.2 API

military operations, whether legal or illegal ones, but is not the case if they generally encourage enthusiasm for the war.

It seems that the majority of experts considered that institutions belonging to the civilian administration, which provide the government with information that the latter misuses in a campaign of ethnic cleansing are not military objectives in the sense of Art. 52.2 API. All experts agreed that political aims may only have a limiting influence on the choice of military objectives and that the way in which political statements determine the nature of military targets had to be strictly limited. On the other hand, it seemed inconceivable for a number of experts that IHL itself may drive strategic choices (e.g. to conduct an air campaign or to occupy with ground troops).

With regard to the minimization of damage, it is uncertain whether a “principle of minimum feasible damage” creates an obligation render a proportionate attack even less costly in civilian lives if technically possible. As far as the evaluation of proportionality is concerned, reverberating effects that are a likely or foreseeable consequence of the attack are factored into the analysis. Art. 57 API calls upon an attacker to take all feasible precautions in the choice of means and methods and to do everything feasible to verify the nature of the target. What alternative means and methods are available is extremely difficult to determine *in abstracto* and depends on a multitude of factors, some of which are given in the British Manual of the Law of Armed Conflict.⁵⁰ The defender’s behaviour has to be taken duly into account. Collocation and intermingling of civilians with combatants necessitates additional precautionary measures. The risk posed to own forces also influences the assessment of available alternatives. The fact that a weapon is more expensive than another one should not influence this decision, however.

It is similarly difficult to determine what measures of verification are feasible in a given situation. Considering the heavy reliance on high technology in targeting today, it is imperative that electronic systems contain correct and updated information. If the attacker has a doubt before or during the attack about the nature of the target or the expected proportionality of the attack, further verifications have to be carried out, even if such measures put the attackers forces at a greater risk. It remains uncertain what level of doubt is required to trigger additional verification measures and what measures of intelligence gathering have to be undertaken before the attack in order to raise doubt in the first place. In an attempt to introduce an objective element, it was suggested that more checks had to be carried out if the attack took place in a fast changing environment.

The frequent disregard for IHL is partly due to the general formulation of its most important principles and the almost complete lack of effective implementation procedures. A suggestions was made to render the principle of proportionality more operational by creating indicators for the evaluation of proportionality. Thresholds could be established the crossing of which would require a higher level of approval for the attack. This suggestion was received was considered impracticable for various reasons. The proposal to create standards for targeting based on best practice guidelines and common criteria did not meet with much more enthusiasm, because of the practical

⁵⁰ Section C.3.a) above.

problems linked to record collection and the political difficulties in elaborating internationally accepted standards. While some experts believed only recommendatory standards could have any success, another group of experts thought that it was conceivable to create a procedure based on an obligation of conduct similar to Art. 36 API.

The experts agreed that enquiries into civilian deaths may be another measure to improve the respect of IHL, but they did not discuss in detail in which cases such an enquiry would have to be undertaken.

E.2. Possible follow-up

The experts thought that it may be beneficial, as a follow-up option to this expert meeting, to bring together representatives of different armed forces to solve a fictional case and explain which factors they would consider for the proportionality evaluation, how they would weigh each of them, and what precautionary measures they would take. The practice of NATO members is relatively well known. Therefore, the view of other States, in particular China and Russia, should be sought. This could be done in form of a workshop or a discussion. Balanced regional representation would also have to be guaranteed if the idea of common targeting standards was to be pursued further. In the light of the political influence on strategic targeting decisions, it was also agreed that high level government officials would have to be involved.

Annex I: List of Participants

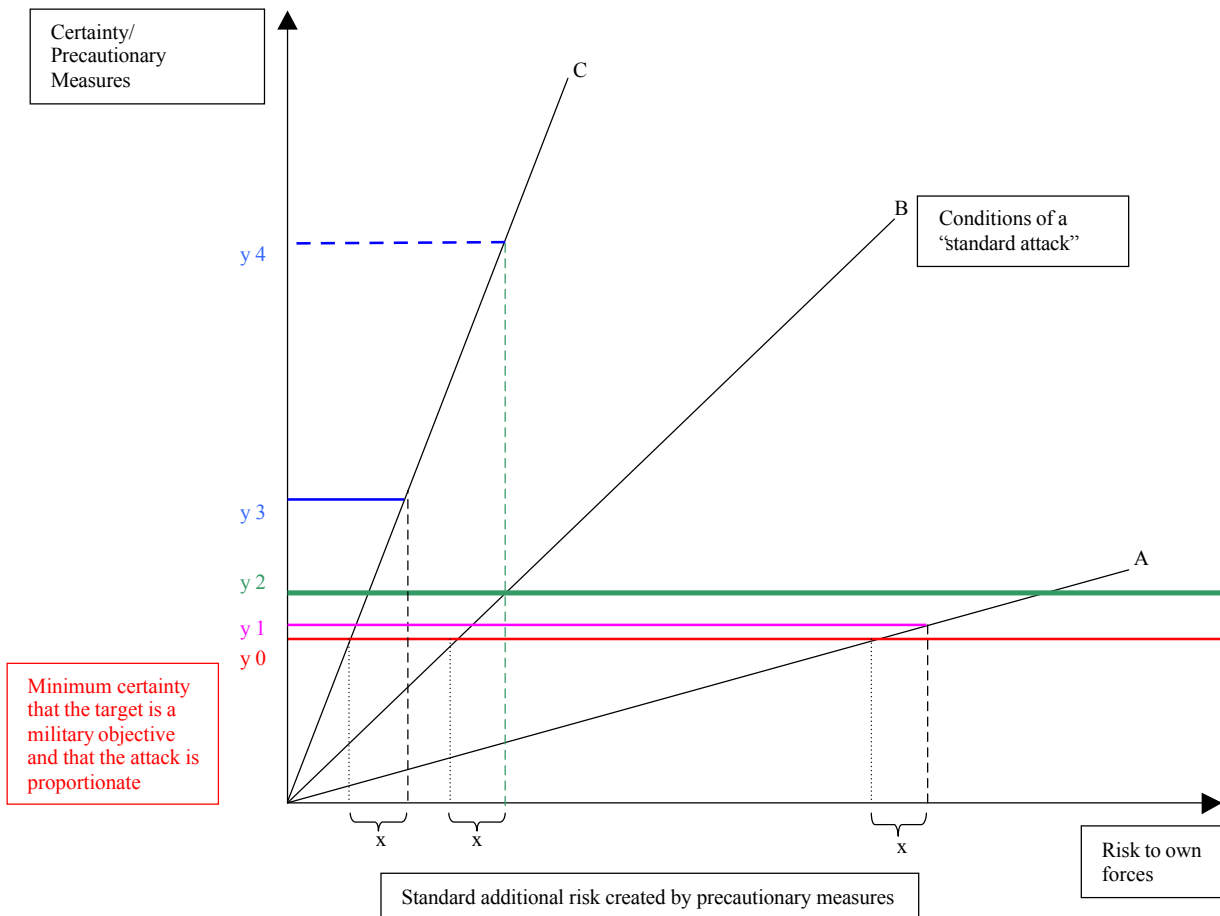
1. Alexandra Boivin, Research Assistant, University Centre for International Humanitarian Law, Geneva, Switzerland
2. Vincent Chetail, Head, Research Department, University Centre for International Humanitarian Law, Geneva, Switzerland
3. Knut Dörmann, Deputy Head, Legal Division, International Committee of the Red Cross, Geneva, Switzerland
4. Barbara Fontana, Humanitarian Policy and Migration Section, Political Division IV, Swiss Federal Department of Foreign Affairs, Bern, Switzerland
5. Daniel Klingele, Head of Section, Human Rights and Humanitarian Law, Directorate of International Law, Federal Department of Foreign Affairs, Bern, Switzerland
6. Peter Hostettler, Head of Section, Law of Armed Conflict, Swiss Federal Department of Defence, Bern, Switzerland
7. Maj. Gen. David Howell, Director of Army Legal Services, United Kingdom
8. J.-F. Queguiner, Legal Adviser, International Committee of the Red Cross, Geneva, Switzerland
9. Pemmaraju Sreenivasa Rao, Former Legal Adviser, Ministry of Foreign Affairs, India
10. Yves Sandoz, Professor of International Humanitarian Law, University Centre for International Humanitarian Law, Geneva, Switzerland
11. Marco Sassòli, Professor of International Law, University of Geneva, Geneva, Switzerland
12. Michael Schmitt, Professor of International Law, George C. Marshall European Centre for Security Studies, Garmisch-Partenkirchen, Germany
13. Steven Solomon, Former Deputy Legal Adviser, Office of Legal Affairs, Permanent Mission of the United States of America to the United Nations in Geneva, Switzerland
14. Helen Upton, First Secretary (Legal), Permanent Mission of the United Kingdom to the United Nations, Geneva, Switzerland

Chair: Louise Doswald-Beck, Professor of International Law, Graduate Institute of International Studies, Director, University Centre for International Humanitarian Law, Geneva, Switzerland

Organization: Gloria Gaggioli, Teaching Assistant, University Centre for International Humanitarian Law, Geneva, Switzerland

Rapporteur: Maya Brehm, Assistant Project Coordinator, University Centre for International Humanitarian Law, Geneva, Switzerland

Annex II: The Feasibility of Precautionary Measures and Own-Side Casualties



Note

The lines **A**, **B**, and **C** represent conditions of attack. Their respective slope is determined by the factors influencing the feasibility of precautions in attack, such as weather conditions, available technology, etc. In a more complex model, these conditions would not be linear.

If we assume that **B** reflects “standard conditions of attack”, **A** represents more difficult circumstances (e.g. bad weather, few appropriate means of verification available), whereas **C** illustrates more comfortable conditions (e.g. favourable weather, many reliable means of verification available).

The red line (**y0**) represents the absolute value of minimum certainty that the target is in fact a military objective and that the proportionality rule will be respected. Naturally, this value is below 100% certainty. In order to reach this minimum certainty, an attacker has to verify the target and choose means and methods that ensure the attack is proportionate.* For an attack to be legal, precautionary measures $> y_0$ have to be undertaken.

At **y2**, an attacker on line B takes all precautionary measures that are feasible in the context of standard conditions, whereby his own forces are exposed to a standard additional risk x .

At the same additional risk x , an attacker facing conditions A would be justified to only take precautionary measures of **y1** ($<y_2$). At the same time, this attacker has to cope with a much higher absolute risk to his own forces than an attacker with standard conditions.

If an attacker enjoying conditions C exposes his forces to additional risk x , he can take precautionary measures of **y3** ($>y_2$), and still expose his forces to a lower risk in the absolute than they would face in a standard attack. It may therefore be argued, especially by proponents of the “principle of minimum feasible damage” that an attacker with conditions C should take additional precautionary measures up to **y4** ($>y_3$) and accept at least an absolute risk to his forces equal to the one accepted in a standard attack. These additional precautionary measures at a higher relative risk find their justification in the favourable conditions of attack that C enjoys.

* It is not clear what measures of verification the attacker has to undertake to reach y_0 , nor at what level of certainty y_0 would be situated. Cf. section C.3 b) and c) above on this topic.